Electro-Voice, Inc. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Case 25–CA–23319

March 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 5, 1995, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions, a supporting brief, and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified here and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by creating an impression of surveillance. We disagree. Employee Tracy Dermody testified that in the beginning of July, she met individually with the Respondent's director of manufacturing, Jay Melton, who told her that her complaints about tools, fans, and ventilation would be favorably considered. When she returned to her work station, Dermody had the following conversation with the Respondent's general foreman, Paul Grasso:

> I asked him [Grasso] . . . why is everyone so interested in our complaints now? And he goes, ''Well, it's not what you think. [Human Resources Manager] Minnie [Warren] was down here before your meeting.''[3] And I go, ''What meeting?'' And he said, ''I'm not stupid,'' and walked away.

In determining whether an employer has created an impression of surveillance, the test applied by the Board is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. See, e.g., *7-Eleven Food Store*, 257 NLRB 108, 116 (1981). Employees should be free to participate in union organizing campaigns without fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Flexsteel Industries*, 311 NLRB 257 (1993). An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. See *Emerson Electric Co.*, 287 NLRB 1065 (1988).

In this case, Grasso's use of ''your meeting,'' as opposed to ''the meeting'' or ''our meeting,'' strongly indicates that he was specifically excluding himself and other management officials from the meeting to which he referred. By excluding himself and other management officials, Grasso implied that it was simply a meeting of employees, and the only employees-only meetings known to have taken place at that time were the Union's organizational meetings. It is undisputed that these meetings were held away from the Respondent's premises at Reggio's and the Ramada Inn and that employees were not openly engaging in protected concerted activities at the Respondent's facility. In addition, Grasso's further sarcastic comment, ''I'm not stupid,'' in answer to Dermody's question regarding what meeting he was talking about, would reasonably tend to indicate that Grasso was referring to an employee union meeting, and that he was taking an interest in the occurrence of such meetings.

In light of these circumstances, we conclude that Grasso's reference to ''your meeting,'' as well as his additional comments, would reasonably lead Dermody to believe that her protected concerted activity was

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge that the Respondent violated Sec. 8(a)(1) by making statements to employees that their support for or membership in the Union would be futile, we rely particularly on Director of Manufacturing and Acting Plant Manager Jay Melton's statement that ''this will not be a union shop.''

We find it unnecessary to rely on (1) the judge's finding that ''[p]ersons union wise (former union representative) and plant wise in their personal interviews with the employees would no doubt have been able to detect union affection''; (2) the small plant doctrine; and (3) the Respondent's recall of four employees in order to limit backpay liability, as supporting the General Counsel's prima facie case of discrimination in violation of Sec. 8(a)(3). In addition, we find it unnecessary to pass on the judge's finding that Kathy Nash is a supervisor within the meaning of Sec. 2(11) of the Act.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

The Respondent argues that the Board should find, consistent with the denial by the U.S. District Court for the Northern District of Indiana of the General Counsel's petition for 10(j) injunctive relief, that the Respondent did not engage in unlawful conduct. We note, however, that a district court's determination in a case involving a 10(j) application for a preliminary injunction is not binding on the Board. See, e.g., *A.P.R.A. Fuel Oil*, 309 NLRB 480 fn. 7 (1992).

[3] The judge correctly set forth this testimony in discussing Dermody's discharge. He, however, in sec. IV,A, entitled ''Impressions of Surveillance'' inadvertently misstated the testimony and, apparently, based his decision on the misquoted evidence.

under surveillance, and this would tend to discourage such activity.

2. The judge concluded, and we agree, that the discharges of David E. Shaffer, Pamela J. Buford, Sherrie Elaine Mize, Jason Allen Havens, December Ellen Barrows, Scott Kendall, Tracy Marie Bentley, Michelle Jo Kinces, and Tracy Jean Dermody violated Section 8(a)(3).[4] In so concluding, the judge found, inter alia, that the attendance policy had never before been administered to effect the discharge of an employee for excessive absenteeism when the employee had fewer than 13 points, nor had the policy ever been used as a show of force in order to bolster attendance. The judge found that the discharges were part of the Respondent's overall scheme to thwart its employees' unionization efforts and that the Respondent's claim that the mass discharge would improve productivity was pretextual. For all the reasons relied on by the judge, we conclude that the Respondent's alteration of its absenteeism policy on July 7, 1994, to discharge employees with fewer than 13 points, similarly violated Section 8(a)(3). Furthermore, because the Respondent unilaterally changed the absenteeism policy at a time when it was obligated to bargain with the Union, this change also violated Section 8(a)(5).

3. The Respondent has excepted to the judge's imposition of a *Gissel*[5] bargaining order. It asserts that the judge failed to justify imposing such an extraordinary remedy by demonstrating that the traditional remedies available to the Board would not ensure that a fair election could be held. We find no merit in the Respondent's arguments.

The record shows that on June 22, 1994, during an organizational meeting, 21 of the 28 unit employees designated the Union as their collective-bargaining representative by signing authorization cards.[6] The Respondent does not dispute the validity of these cards. Accordingly, we find that as of June 22, the Union represented a majority of the unit employees. On July 7, the Union requested that the Respondent recognize and bargain with it. The Respondent failed to do so and, later that day, the Union filed a representation petition in the Board's Regional Office.

In agreeing with the judge that a *Gissel* bargaining order is a necessary component of the remedy in this case, we find that the Respondent's conduct clearly demonstrates that holding a fair election in the future would be unlikely. In this regard, we note that the Respondent's misconduct included the discharge of approximately one-third of the bargaining unit on July 7 immediately after the Union demanded recognition and filed the representation petition, threats of plant closure by the Respondent's director of manufacturing and acting plant manager, Jay Melton, interrogations by Melton and Human Resources Manager Minnie Warren, solicitation of grievances and complaints, and providing benefits to discourage union activity. The enduring coercive effect of the Respondent's misconduct, considered as a whole, cannot be denied.

Within hours of the Union's demand for recognition, the Respondent discriminatorily altered its attendance policy and then used that policy to discharge one-third of the unit employees, all of whom had signed union authorization cards. Such action can only serve to reinforce the employees' fear that they would lose employment if they persisted in union activity. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987). The impact of this action was magnified by the fact that it occurred on the same day that the Union demanded recognition. See *Astro Printing Services*, 300 NLRB 1028, 1029 (1990).

With this swift, mass discharge, the Respondent sent its employees the unequivocal message that, even though high levels of absenteeism among its work force had caused disruption to its operations, the Respondent nevertheless preferred to operate without one-third of that experienced work force and with inexperienced temporary personnel instead, in order to extinguish the union organizational effort. That message will have a lasting effect on the unit employees' exercise of their rights to organize. Discharging approximately one-third of the bargaining unit is unlawful conduct that ''goes to the very heart of the Act'' and is not likely to be forgotten. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Further, Jay Melton made threats of plant closure to amassed groups of employees. We have long held that threats of plant closure and other types of job loss are more likely than other types of unfair labor practices to affect the election conditions negatively for an extended period of time. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1141 (3d Cir. 1995). Such threats serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood. We also note that Minnie Warren's and Jay Melton's indi-

[4] The Respondent contends that the General Counsel has not established a prima facie case because he has not proven that each individual discriminatee was a union supporter or that the Respondent was aware of each individual's union support. We find no merit in this contention. The General Counsel need not establish that the Respondent had knowledge of each discriminatee's particular union activity. It is well settled that unlawful motivation may be established when, as here, an employer takes adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group ''to discourage union activity or in retaliation for the protected activity of some.'' *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985); *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993); *Rainbow News 12*, 316 NLRB 52, 67 (1995).

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[6] Ultimately, 22 unit employees signed authorization cards.

vidual meetings with the unit employees, which involved unlawful solicitations of grievances, promises of improved terms and conditions of employment, and interrogations, occurred at the same time as the Union's fledgling organizational efforts.

By improving the employees' working conditions, the Respondent committed another highly coercive and enduring unfair labor practice that directly affected a substantial portion of the unit employees. After the Respondent's successful 2-week crusade to quell the employees' organizational efforts, the Respondent made improvements in working conditions, including installing additional fans and making bathroom and breakroom repairs. Although the Respondent was aware of the need for these improvements long before the union organizing began, it delayed addressing these needs until after the union activity ceased. The Supreme Court has long recognized that employees are quick to perceive the ''fist inside the velvet glove'' implicit in such tactics. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). And the Board has noted that unlawfully granted benefits ''are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees.'' *Triec, Inc.*, 300 NLRB 743, 751 (1990), enfd. 946 F.2d 895 (6th Cir. 1991).

The severity of the Respondent's misconduct is further compounded by the involvement of high-ranking corporate officials in the commission of virtually all the unfair labor practices in this case. Specifically, Ron Graham, vice president for human resources, decided to change the attendance policy on July 7 and to discharge one-third of the bargaining unit according to that policy. Jay Melton, director of manufacturing responsible for all four of the Respondent's plants, and Minnie Warren, human resources manager based at the Respondent's Buchanan, Michigan location, made threats of plant closure and job loss, and personally interrogated unit employees. When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten. See *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir.), cert. denied 115 S.Ct. 2609 (1995).

The Respondent asserts that its course of misconduct occurred only during a limited, 2-week period and that, in light of its 46-year ''excellent'' relationship with the Union at three other locations, holding a fair election is not unlikely. On the contrary, we find that the Respondent's actions were swift, strong, pervasive, and effective. That the Respondent's unlawful actions were highly concentrated into a 2-week period only enhanced their severity and lasting impact on employees' free choice.

As soon as the Respondent became aware that some employees had an interest in unionization, Warren arrived at the plant and began interrogating employees, soliciting grievances, and promising improvements. Immediately on being dispatched to serve as acting plant manager, Melton turned the Respondent's antiunion campaign up a notch by threatening plant closure/job loss at employee meetings, followed up with coercive one-on-one interviews with unit employees. Finally, when the Union requested recognition and filed an election petition, the Respondent's antiunion efforts culminated in the mass discharge discussed above. By this well-orchestrated, intensive, 2-week course of conduct, the Respondent effectively killed off the Union's organizational campaign and proclaimed to the employees that self-organization would not be tolerated.

In light of all these circumstances, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices is slight and that holding a fair election is unlikely. Accordingly, we agree with the judge that a *Gissel* bargaining order is warranted.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Electro-Voice, Inc., Mishawaka, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment in the following appropriate unit:

> All production and maintenance workers, including maintenance and lead persons at the Respondent's facility in Mishawaka, Indiana; BUT EXCLUDING office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally changing the attendance policy, without first notifying and bargaining with the Union to impasse or agreement.

[7] Because of the serious nature of the violations and because the Respondent's egregious misconduct demonstrates a general disregard for the employees' fundamental rights, we find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Sec. 7 of the Act, *Hickmott Foods*, 242 NLRB 1357 (1979). We shall further amend the judge's recommended Order and notice to remedy all of the unfair labor practices found herein.

(c) Changing the attendance policy in order to discharge any employee for engaging in union or other protected concerted activities, or to discourage any employee from engaging in such union or other protected concerted activities.

(d) Discharging or otherwise discriminating against any employee for supporting or joining the Union, or any other labor organization.

(e) Threatening any employee that, if the Union comes in, it will close the Mishawaka plant.

(f) Threatening any employee that, if the Union comes in, it will remove work from the Mishawaka plant.

(g) Coercively interrogating any employee about union support or union activities.

(h) Soliciting grievances from any employee and explicitly or implicitly promising to remedy or adjust them.

(i) Providing any employee with benefits in order to discourage union activities.

(j) Telling any employee that supporting the Union will be futile.

(k) Creating the impression that any employee's union activities are under surveillance.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

(b) Rescind and cease giving effect to the attendance policy to the extent that it was changed to permit discharges for fewer than 13 points.

(c) Offer David E. Shaffer, Pamela J. Buford, Sherrie Elaine Mize, Jason Allen Havens, December Ellen Barrows, Scott Kendall, Tracy Marie Bentley, Michelle Jo Kinces, and Tracy Jean Dermody immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to the unlawful discharges and notify each of the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(f) Post at its facility in Mishawaka, Indiana, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment in the following appropriate unit:

> All production and maintenance workers, including maintenance and lead persons at our facility in Mishawaka, Indiana; BUT EXCLUDING office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change the attendance policy, without first notifying and bargaining with the Union to impasse or agreement.

WE WILL NOT change the attendance policy in order to discharge our employees for engaging in union or other protected concerted activities, or to discourage our employees from engaging in such union or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because of your support for or membership in the Union, or any other labor organization.

WE WILL NOT threaten you that, if the Union comes in, we will close our Mishawaka plant.

WE WILL NOT threaten to remove work from the Mishawaka plant if the Union comes in.

WE WILL NOT coercively interrogate our employees about their union activities.

WE WILL NOT solicit grievances from our employees and explicitly or implicitly promise to remedy or adjust them.

WE WILL NOT provide our employees with benefits for the purpose of discouraging union activities.

WE WILL NOT tell our employees that supporting the Union would be futile.

WE WILL NOT create the impression that our employees' union activities are under our surveillance.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

WE WILL rescind and cease giving effect to the attendance policy to the extent that it was changed to permit discharges for fewer than 13 points.

WE WILL offer David E. Shaffer, Pamela J. Buford, Sherrie Elaine Mize, Jason Allen Havens, December Ellen Barrows, Scott Kendall, Tracy Marie Bentley, Michelle Jo Kinces, and Tracy Jean Dermody immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify each of them in writing that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

ELECTRO-VOICE, INC.

Walter Steele, Esq., for the General Counsel.
Thomas J. Barnes and *James R. Stadler, Esqs.*, of Grand Rapids, Michigan, for the Respondent.
Al Warzecha, of Fort Wayne, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The original charge filed in this proceeding on July 8, 1994, in Case 25–CA–23319 by International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union) was served on Electro-Voice, Inc. (the Respondent) on July 8, 1994. The first amended charge filed by the Union on July 19, 1994, was served on Respondent on July 20, 1994. The second amended charge filed by the Union on August 30, 1994, was served on the Respondent August 31, 1994. A complaint and notice of hearing was issued October 18, 1994. The complaint, among other things, alleges that the Respondent committed certain 8(a)(1) violations and discharged employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The complaint came on for hearing at South Bend, Indiana, on December 19–22, 1994, and January 17–19, 1995. Each party was afforded a full opportunity to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

At all times material Respondent, a corporation with an office and place of business in Mishawaka, Indiana (Respondent's facility), has been engaged in the manufacture and sale of audio equipment.

During the 12-month period ending July 1, 1994, Respondent, in conducting its business operations described above, sold and shipped from its Mishawaka, Indiana facility goods and materials valued in excess of $50,000 directly to points outside the State of Indiana.

During the 12-month period ending July 1, 1994, Respondent, in conducting its business operations described above, purchased and received at its Mishawaka, Indiana facility goods valued in excess of $50,000 directly from outside the State of Indiana.

At all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Respondent is a wholly owned subsidiary of Mark IV Audio, Inc. Respondent has manufacturing facilities in Buchanan, Michigan; Mishawaka, Indiana; and Severville and Newport, Tennessee. The Mishawaka plant manufactures fiberglass stadium horns, electronic crossover panels, and cables for military headsets. Respondent purchased the Mishawaka plant in 1986. The smaller speakers, personal sound equipment, and parts for helicopters are assembled in the ''back room'' where most of the female employees were employed.

Ronald M. Graham, employed by Mark IV Audio, is its vice president of administration (vice president of human resources) in charge of all nonfinancial matters for the Mark IV Audio, Inc. that includes Electro-Voice in Mishawaka, Indiana. His office is at Buchanan, Michigan, about 25 miles from Mishawaka. He has ''world-wide responsibility'' for 15 companies and 13 manufacturing facilities. Mark IV Audio is ''about a two billion dollar company.''

Minnie Warren in 1992 became the human resources manager with primary responsibility for the human resource functions at the Buchanan plant and oversight responsibility for the human resource functions at the Mishawaka plant. Her office is located at Buchanan. Jay Melton is the director of manufacturing for Electro-Voice covering four plants including Mishawaka. At one time Melton had been a representative of the Union. His office is located in Severville, Tennessee. Paul Grasso is the general foreman of the Mishawaka plant.[1] Graham, Warren, Melton, and Grasso are alleged to have participated in the unfair labor practices alleged. Until June 27, 1994, Dennis Northam was the manager at the Mishawaka plant.

Warren reports directly to Graham. The human resources managers in Tennessee and Oklahoma City report directly to Graham. Warren is the only person in the Mishawaka plant who reports directly to Graham. Warren ''interfaces directly'' with the Mishawaka plant manager.

Northam was ''responsible for the day-to-day operations of the plant, productivity, the overall management of the plant,'' and had the authority to discharge employees. Northam reported to Melton. Since Graham has been vice president, he has never been involved in the discharge of an hourly employee.

Dennis Northam was not favored by the employees. The employees had many complaints. One involved the no-fault absenteeism system. Employees objected to the system because of the alleged harsh way it was administered by Northam.

In January 1994 an employee, Pamela J. Buford, phoned Warren who put Melton on the line. Buford complained about Northam. She told them that the point system (absentee policy) was unfair, that the employees ''did not have the right tools to work,'' and that there was no hot water in the bathroom. According to Buford, thereafter in March or April, Northam and Grasso met with about 12 or 13 employees in the lunchroom. Northam told them that ''Buchanan had received a phone call and that someone was complaining and they didn't like it and they wanted it stopped. And that the point system was not going to change, that it had always been that way and it was going to stay that way.''

Conditions that had aggravated the employees did not improve. In early May 1994 the employees began discussing the Union. Buford was the first advocate. She talked to almost all the employees. The union thrust was prompted by the way the Respondent treated its employees.[2]

Buford contacted the Union around June 15, 1994. A meeting of employees with a union representative was set up for June 17, 1994, at Riggio's, ''a restaurant right down the road from Electro-Voice,'' two or three blocks. Sixteen employees attended and signed an attendance sheet. At the time there were 29 employees including Kathy Nash in the appropriate unit.

According to Warren, some time prior to June 22, 1994, she had received a phone call from a ''gentleman'' who did not give his name. He threatened to see an attorney concerning no hot water in the bathroom, lack of fans, and a ''girlfriend'' who had a son who was undergoing knee surgery and could not obtain leave.[3] Prior to this call Warren had received information that there were ''drug dealings'' at Mishawaka. She took this matter up with Northam. Northam said it was a ''disgruntled employee.'' Warren reported the matters to Graham.

According to Warren, Graham related to her that while playing golf with employee Scott Ressler, a son of a former Buchanan manager, Graham had asked about the drug problem. Ressler said he did not believe it was ''currently occurring,'' but there were ''some problems he had heard about . . . because of the kind of hiring that Dennis Northam had been doing.'' According to Warren, Graham told her Ressler had told him about union rumors. Graham fixed this conversation with Ressler around June 14, 1994.

According to Graham he played golf again with Ressler on June 21, 1994. Ressler said, ''Ron, can I talk to you about the Mishawaka plant?'' Whereupon Ressler ''unload[ed]'' on Graham for about 30 minutes about the problems with the Mishawaka plant. Northam was highly criticized. According to Ressler ''there were individuals in the plant who treated our attendance policy as a joke.'' On the next morning, June 22, 1994, Graham briefed Warren and sent her to Mishawaka ''to interview every employee. And I want you to find out what is going on down there with Dennis. And I'll tell you now, that if we verify that this in fact is the way that Dennis is operating, then I am going to recommend his discharge.'' Warren went to Mishawaka on June 22, 1994.

Likewise on June 22, 1994, the employees again met in a union meeting at the Ramada Inn. Alvin A. Warzecha, a union director of organizing, attended the meeting. He asked the attendees whether they ''were ready to organize, or if they wanted more time to ponder the situation.'' They responded that they were ready. Twenty-one attendees signed union authorizations.

---

[1] In late July 1994, Grasso was promoted from general foreman of the military cable and crossover lines to plant manager of the entire Mishawaka plant.

[2] One of the ''girls'' was ''like, one minute late and she got a half point for it.''

[3] The ''girlfriend'' was Buford.

On June 22, 1994, as instructed by Graham, Warren journeyed to Mishawaka and met with employees in a group. According to Warren she ''talked to them about the phone calls and [she] told them that I would be meeting with them individually to find out what their concerns were.'' She also said there would be drug testing and that things would be different. Michelle Jo Kincses remembered Warren saying, ''To find out what our complaints were, if we had any problems, personal problems, to see what she could do to make the plant better for us.'' Employee December Ellen Barrows remembered Warren said, ''[I]f [one] had problems, that she would like us to come to her, and they would try to work with us [and get] things done.'' Barrows also remembered that she had received ''a couple of telephone calls complaining about conditions at Mishawaka,'' and that the person had complained about ''no hot water in the bathrooms, no fans, and an attendance system that wasn't fair.''

On June 23, Warren, as instructed by Graham, commenced individual interviews with all the employees. According to Warren although she had heard from Graham that there were union rumors, the Union was not mentioned by her during the interviews. The purpose of the interviews was to find out what the employees' problems were. After 28 or 29 interviews Warren reported to Graham that the problem was Northam and recommended that he be discharged.

Employees testified as to their conversations with Warren. When Jason Allen Havens met with Warren she asked him if he had any complaints. He told her the morning break was ''kind of short.''

When Buford met with Warren in the manager's office she asked her what things were wrong. Buford mentioned the plant manager, the condition of the tools, and the point system. Warren said she was looking over the point system policy and trying to make it better. Warren said that they were going to get fans, were looking into the bathroom situation, and they would get proper tools.

When employee Sherrie Elaine Mize met with Warren, Warren said that ''they were trying to get everybody's complaints about what they were unhappy with, with the plant, or what we felt needed to be changed.'' Warren asked Mize whether she had any complaints. Mize mentioned the lack of fans. ''She said that her and Jay would get together and they would see what changes they could make towards making it better.''

When December Ellen Barrows met with Warren in Northam's old office, Warren said if they had any problems to tell them to her. Barrows mentioned a raise, the fans, the tools, and the breakroom. The breakroom was too small. She also complained about the point system. ''She said that she wanted to try to help us get things done, and then she started putting the union down.'' ''That she had been in the union; the union could not do anything for us.'' Warren said that ''she was doing something toward the point system.''

When Scott Kendall met with Warren in the manager's office, Warren asked him what he ''might'' need. He replied that he would like to get out of the grinding room and they needed more fans. Warren said they were getting more fans. Kendall also testified that she said, that ''she didn't believe there [were] enough people to support a union.''

When Tracy Marie Bentley met with Warren, Warren asked her also concerning plant problems. When Tracy Jean Dermody met with Warren, Warren asked her if she had any complaints, Dermody replied fans and the point system. Hot water and the breakroom where mentioned. Warren said that ''she was going to look into that.''

When Michelle Jo Kincses met with Warren. Warren asked her if she had any complaints. Kincses said fans and hot water were needed and talked to Warren about the point system and wages. Warren said that ''she thought she was going to revise the point system.''

On June 23, 1994, according to Graham, Warren reported on her interviews. Graham testified, ''[S]he related to me in general terms, the kind of things that were coming out of her conversations with the employees. . . . there were real concerns . . . about the attendance policy. . . . she did relate to me some incidents, for example, where Dennis Northam had charged someone a point for being like ten seconds late in the morning.'' Warren confirmed the kind of things that Scott Ressler had told Graham about Northam's behavior.

When Warren returned to the plant Graham told her that he wanted to be ''in a position to make a decision about [him] Northam . . . to Roger Gaines,[4] by the end of the day on Friday, [June] 24th.'' Warren returned about 4 o'clock and after about a ''30 minute or so conversation,'' Graham and Warren went to Roger Gaines' office. Graham said, ''Roger, we recommend that we release Dennis Northam right away, and that we get the appropriate resources in here, and get this operation going in the right direction.'' Gaines called Melton in Tennessee and told him to be in the Mishawaka plant on Monday. ''He was to take care of the termination of Dennis Northam. . . . he was to free his schedule so that he could stay and manage the plant for a reasonable period of time, until we [could get] it straightened out.'' Melton appeared in Mishawaka, discharged Northam, and called a meeting of the employees on June 27, 1994, ''up front.'' He advised the employees that Northam was no longer with the Company. According to employee Kincses, among other things Melton said, ''[R]est assured, this will not be a union shop.'' Melton said that he would be taking the place of Northam and would be interviewing the employees personally. ''[H]e wanted to find out our complaints and what could be better, what he could do to make the plant better.'' Melton also said that the Mishawaka work would go to the plant in Austin, Texas, which had a fiberglass shop, ''if a union came in.'' Employees raised the matter of points and fans. Melton said fans had been ordered and the point system was being revised. He also said the Respondent would be getting new tools.

Employee Mize, who attended the meeting, remembered that Melton introduced himself and said he wanted to hear the employees' complaints. He said that ''there would not be a union or the plant would shut down.'' Complaints registered were that the bathroom stalls were too small, the bathroom had no hot water, the breakroom was too small, the ventilation for the soldering was not proper, tools were not adequate, and the point system was unfair. Barrows, Kendall, Bentley,[5] Dermody, Shaffer, and Vore, who attended the meeting, all testified that Melton said the plant would close if the Union comes in or words to that effect. There would

[4] Roger Gaines was the vice president for manufacturing for Mark IV Audio, Inc. He was Melton's immediate supervisor.

[5] Bentley testified Melton said, ''[T]here will be no union in the shop.''

never be a union in the shop.[6] Employee Dermody remembered that Melton said that ''there will be no union here in the shop. . . . he started in the lowest job and worked himself up. And he was part of the union at one time and the union didn't do anything for him . . . the union can't protect your job, the union can't give us more money . . . he is there and to get things back to normal, that he hears our complaints.'' Dermody also remembered Melton said, ''Do not give up your right to independent thinking. You have the right to make up your own mind. Don't let somebody else do it for you.''

Linda Marie Vore, an employee who was not discharged but is still working for the Respondent, also attended the Melton meeting and testified. Her testimony was particularly trustworthy. ''[H]e [Melton] talked about how he knew there were problems and they were going to try to do things about it . . . he said . . . there will not be a union.'' Vore remembered the words ''if the Union came in the plant, or words to this effect, that the plant would be closed'' but was unable to attribute them to any person.

Melton, Warren, and several other Respondent employee witnesses testified in contradiction of the above-related testimony. Their testimony is not credited.

About a week later, on June 29, 1994, Melton met again with the employees. Appearing with him was Anthony Gale Sawyer, director of quality, Mark IV Audio, who discussed the care program and showed a video. Employee Mize testified, ''He [Melton] did bring up about the union again, stating that there would not be a union or they'd shut the plant down. And then, you know, if we'd go to them with our complaints, then they would see what they could do . . . they could move our work up to Buchanan.'' Kendall remembered someone said, ''[T]hey could do what a union could do, and they didn't need a union.''

Employer complaints were also solicited. Melton said, ''He was looking into it, he was comparing our plant to the Tennessee plant and what he has done down there and what he would like to do up here.''[7]

Melton admitted that he mentioned the Union at the June 29 meeting, ''I'd heard that there were rumors via the Frank [Simon's] conversation. . . . there was no need for a union in Mishawaka . . . my experience in a union, they can't do anything for you, that only the company can give you things.''[8] Melton made clear that the Respondent would ''prefer that the plant be a non-union plant.''

Melton was asked, ''Was there any particular issue or problems or concerns that was raised that you promised on the spot to take care of?'' Melton answered, ''Fans, in particular.'' Melton also testified that he told employees that the plant was purchased for the ''fiberglass.'' The backroom came into being because of a very price sensitive margin ''cable was one of the first things that came into that plant . . . in fact, because of competitiveness and either you go off shore type vendors or this type thing because we constantly do make buy decisions and Mishawaka came about.'' ''Cable was becoming a prohibitive item in getting contracts, government contracts. Anything you can take out of the price of a product. And that's where Mishawaka fit.'' Melton also testified, ''I did go through and cover the rumors of the organizing attempt.[9] I went right down my list that there is no need for a union[10] in there because of the problems we had in the plant; you wouldn't have had them if Mr. Northam had been doing his job.''[11]

Melton testified that Mishawaka cable work came out of the Severville plant. ''Cable became a problem in the arena of competitiveness. It was offered to our Buchanan facility at a special low rate. The union voted on that fact and they did not want it there. So Mishawaka up to that time had none of this type of work and that's—that's how it came to Mishawaka. It was either there or try to find somebody else to do it or go off shore with it and we would much rather control our destiny building those type of products.'' The cable work being performed at Mishawaka goes into the products at the plant in Severville. The Mishawaka cable work can be performed in Severville, Tennessee. It would be ''easy'' to move the work to another plant. ''Mishawaka is I believe, our most competitive plant.'' The Severville plant is unionized.

According to Grasso, Melton said the ''problems that were existing here at Mishawaka could be resolved without any union.''

In the affidavit of Respondent witness Frank Simon Jr. appears, ''Jay Melton did say there was no need for a union and Mishawaka employees should not give up the right to independent thinking.'' Respondent witness Donald James Simon testified that Melton said that ''he had heard rumors that some of us had, uh, thought about getting together for a union meeting and, uh, he just let us know that we shouldn't have to do that . . . he had been in the union before, and, uh, he had seen both sides and he said in our situation he really didn't see any reason for us to go in that direction and he wished that we didn't.''

Ressler, Graham's golf partner, testified that Melton said that ''in his opinion that he felt there was no need for a union there.''

Employee Kathy Nash was asked, ''Did he [Melton] make any promises about any of the employees' complaints?'' She answered, ''No. He just said he would look into them. He said we would all talk about it and see if there is a need for things.''[12]

Nash testified that at the meeting employees lodged complaints about the fans, tools, bathroom doors, and hot water.

---

[6] On July 14, 1994, Barrows gave an affidavit ''Jay [Melton] said, the first thing out of his mouth, that there will be no union in that shop, and he repeated this two or three times during his speech. . . . the plant would close down first.''

[7] Testimony of Dermody.

[8] Melton had discussed with Roger Gaines, his boss, what he would cover in his speech.

[9] Melton testified that he referred to the Union in his remarks ''because of the rumor in the plant. We've had rumors for years and competition can be affected in many ways, including a union. I've seen it happen in plants where you can drive work out because of the raise in prices and Mishawaka has a very fine line in competitive products back there and *my concern was anything that might it would—would be an issue.*'' (Emphasis added.)

[10] Grasso's affidavit reveals, ''I was in attendance at the meeting on June 29th. Jay Melton stated that there was no need for a union at the Mishawaka facility.''

[11] Melton testified that ''Northam's conduct was such that it would cause employees to want to join [the] union.''

[12] The Respondent, from the standpoint of the employees, modified the absenteeism policy for the better on June 30, 1994.

According to Nash the hot water was ''fixed'' and fans were furnished; and tables were added to the breakroom.

After the June 29, 1994 meeting Melton commenced meeting individually with employees. He talked with Linda Vore, December Barrows, Peggy Eichorst, Pam Buford, Eppie Plank, Judy Smith, Michelle Kincses, Sandy Weaver, and Tracy Dermody.[13]

Melton testified that he talked to these employees to get their reaction to Grasso to ascertain their concerns such as ''tools and what-have-you'' and get acquainted with them. In regard to the Union, Melton testified that he voiced the ''same concerns about the union and the right to their independent thinking, because, typically, they won't get that from the other side.''

Graham meanwhile was in Oklahoma City where he was informed by Warren that Northam was discharged. Graham advised Melton that he was coming to the Mishawaka plant right after the July 4th holiday to ''review the circumstances there.'' What he wanted to deal with ''were the hiring practices and the administration of the attendance policy.''[14] It was a ''prearranged meeting'' with Melton, Warren, and Grasso.

In the meantime on July 5, 1994, the Union held another meeting at the Ramada Inn for the purpose of ascertaining whether the employees wanted to proceed or wanted to back off. Eight or nine employees attended. The ''outcome of the meeting was, that the people were still committed, and that we would go ahead and petition.'' A recognition letter was prepared and a petition to the Board that Warzecha was going to deliver to the Board at Indianapolis, Indiana.

On July 7, 1994, Warzecha delivered the recognition letter to the Respondent at around 8:15 a.m. marked for Melton. It was given to Margaret Michael, the office manager; Warzecha then proceeded to Indianapolis to file the petition.

The meeting of Graham, Melton, Warren, and Grasso was scheduled for 9 o'clock a.m. When Graham arrived he was handed the recognition letter. Graham read the letter. Graham testified that he was not surprised by the letter because of ''the way Dennis Northam had been treating the people, and the fact that Dana Fair has probably once a month, reminded me . . . he is going to organize the plant.''

At the meeting Warren produced a list of the Respondent's employees with points set out that Graham had requested. Graham asked her to add hire dates. Thus the list of employees that Graham had in hand contained the points of each employee and some hire dates.

Graham told Melton, Warren, and Grasso, ''I think we've dealt with this Northam here. And we need to get this plant straightened out. And I think that we need to take some pretty strict action here, to deal with this absentee problem.[15] And my recommendation is that we look at anyone who has more than seven points, or anyone who has less than six months with us, that has a good number of points.''

Graham testified he did not consult everybody's attendance records nor ''personally consult any production records.'' Graham recommended that anyone with more than seven points should be discharged. According to Graham he went down the employee list and asked if there was any reason action should not be taken against the employee. Warren spoke for Debbie Lillo who had seven points because she ''indicated that she did not have a full understanding of the absentee policy in her earlier months, and that she had gone through a heated divorce. And that since that time, she had straightened out her record.''

Graham said the employees chosen for discharge were discharged ''to accomplish, is *that we wanted to get people serious about our attendance policy, serious about coming to work every day, and being there when they were supposed to be*.'' (Emphasis added.)

Graham testified that the conferees discussed that discharging the employees would be ''a big hit.'' ''One of the things that we concluded is that we had been carrying at least one extra person because of the absentee rate. So by getting people to come to work, there was one less probably needed. And we would replace these people with people from a temporary employment service that Minnie had contact with. That was for contract labor.'' Melton testified that the Respondent would ''suffer some short-term loss.''

Warren, who participated in the discharge discussion, testified that she had not recommended any of the discharges; Graham made the decision to discharge, the others concurred. Apparently when Warren entered the meeting she did not know that Graham was going to fire anybody. Grasso testified that he made no recommendations to discharge any employee. Grasso had a very limited participation in the meeting.

Graham was asked, ''What was so magical about the number seven?'' Graham answered, ''Seven seemed to me, to be an exorbitant number.'' ''Q. All right. Well, why not six? A. Seven occurred to me.'' Except for Lillo, mitigating circumstances were not considered for any dischargee. The conferees were asked, ''[I]f there was any reason that we should not take these actions with these people.''

Graham determined that the discharges should take place that day and directed Warren to read a statement[16] which he drafted to each employee as he or she was discharged. Graham did not participate in the actual discharge. Graham testified that the decision to discharge was based ''solely on their

[13] Four of these employees were discharged later.

[14] As noted the attendance policy had been modified already on June 30, 1994. According to Graham he had instructed Warren right after the discussion with the employees to ''update the policy . . . to put the language in there about allowing up to one-tenth of an hour tardiness . . . to update the policy to allow for these scheduled medical treatments.''

[15] Graham testified that he ''didn't look at anything'' prior to the meeting to lead him to believe there was an absentee problem. Graham said, ''I had Scott Ressler telling me that the employees thought it was a joke.''

[16] The statement read:

ELECTRO-VOICE, INC.

DICIPLINARY ACTION [sic]

EMPLOYEE_____ CLOCK#_____ DATE_____
DEPARTMENT_____ NATURE OF OFFENSE_____

Based upon the review over the past several weeks Jay, Paul and I have reviewed the entire situation in Mishawaka.

This review of the situation included quality, productivity, attendance, and work record. After this review we have decided to take corrective action.

In review of your situation for the length of employment your absenteeism and tardiness is unacceptable. Therefore your employment is being terminated effective immediately.

excessive and chronic absences . . . with some additional information coming to play with performance on at least three individuals'' (Kendall, Havens, and Shaffer). In his affidavit, Graham stated, ''I told Minnie to be sure to tell the employees—That they were being discharged for excessive or chronic absenteeism and tardiness.'' Graham's seven-point method for discharging employees had never been used individually or en masse before. Graham testified that in ''most cases'' mitigating circumstances would be considered. No mitigating circumstances were considered for the discharged employees. Neither were their attendance records checked.

Graham testified that he made up his mind to discharge the employees when he looked at ''the summary of the absentee problems.'' Graham also testified he was moved because ''our absentee program was being viewed as a joke.''

Temporary employees were hired who went to work the next Monday. ''We didn't need as many people as we were letting go. We could do it with less people.''

Later, some of the dischargees were rehired, Graham testified that they were rehired because, ''We wanted to cut off some of the liability.'' ''Because we wanted to give them another chance.''

Although an employee may be discharged for accumulating 13 points Graham testified, ''That didn't necessarily mean that would be automatic discharge.''

According to Graham the Mishawaka plant is about evenly split between the number of people who work in fiberglass, the front of this plant, and the people who work in assembly in the back half of the plant. The fiberglass and horn operation is ''absolutely critical'' to the Company's operation because there are not dependable suppliers and they are unique to the Company. The backroom came in existence when the Company had an opportunity to recapture the building of cables from an outside vender for government business. To recapture this business the Company needed a lower labor rate. The work was offered Buchanan but the Union refused to make the adjustments so the work was put in Mishawaka. Later a portable loud speaker called the S-40 was placed in Mishawaka where there were lower labor rates and lower overhead. According to Graham, ''there was just no way that we could do it with the labor—the labor structure'' in Buchanan or Newport. Competition was keen enough for the Company to place these operations in Mishawaka.

Graham testified, ''[T]here is way too much invested there to—to, uh— . . . to let the plant go at the—the kind of risk that we thought it was.''

Employee Frank Simon Jr. described a previous union campaign in which he participated in the summer of 1988. The campaign was widely known by management and all the employees in the plant. About 14 to 16 employees were interested. The movement ''just went away'' after the employees met with the Company. ''We just wanted to know where we stood and what kind of money we could make.''

Respondent witness Sandra Lee Weaver testified that she talked to Grasso on July 6, 1994, Grasso was reported to have said Weaver was as ''bad''[17] as Buford ''[b]ecause the way she was manipulating everybody to get into the union.'' Weaver went to Grasso for clarification. Weaver testified that Grasso mentioned the Union to her ''because they knew the meetings were going on.'' Grasso asked Weaver why she was ''upset.'' Weaver explained to him ''why and he sat and talked to [her] and comforted [her].'' Weaver admitted that she had signed a union card.

Grasso admitted that Weaver had come to him in his office and asked if he had made ''some derogatory remarks about her.'' ''She discussed about a meeting that they had the night before. . . . she said it was a meeting where she had signed a card for a union. . . . she wanted to know what to do. . . . she wanted to know if she could retrieve it.'' Grasso responded, ''I thought that was an option that she had if she really didn't want to sign the card.'' Weaver called Warzecha and told him to tear up her card.

Weaver testified that there were employees who feared for their jobs. Incongruously Grasso denied that he had heard about the Union prior to July 5, 1994, at which time he learned while firing Shaffer that there was union activity. Weaver signed her card on June 24, 1994.

Barrows testified that in January Northam, in response to someone calling Buchanan and complaining, told employees ''there was no use for us arguing over the policy because the policy was not going to change.'' Bentley testified Northam had said that ''there would be no union in his shop, they would close it down first.''

Kincses testified that Grasso, while talking to a group of ''girls,'' commented that it ''might happen'' that the Respondent would close the plant if the Union came in. This statement occurred about the time Melton made his first speech.

After the meeting of Melton according to Barrows ''people were starting to feel scared. . . . Afraid that they would lose their jobs.'' Bentley also testified that the employees were ''getting scared . . . [c]ause the company was telling us that there wasn't going to be a union they feared for their jobs.'' Kincses testified in a similar vein.

A. *The Absenteeism Policy*

Until June 30, 1994, the Respondent followed a written absenteeism policy dated March 1, 1987. Among other things the policy provided:

> In order to assure consistency in administration and equity in treatment *no-fault absenteeism policy and procedure will be used*. Absenteeism is defined as being absent from work on any scheduled work day, even though the employee has reported such absence. Tardiness is defined as reporting to work after the scheduled starting time. [G.C. Exh. 3.]

Under the policy employees were given points for absences and tardiness. If an employee received 3 points, the employee received a verbal warning; 5 points, a written warning; 7 points, 1-day suspension; 10 points, 5-day suspension; and 13 points, discharge. The following were not considered absences: work-related disability, hospital confinement, jury duty, military duty, vacation, holiday (designated), ambulatory surgery, and preadmission testing. Employees' points were reduced by one point for each 2-month period in which he or she had not incurred a chargeable occurrence.

[17] Weaver answered, ''Right'' to the question ''when you say you were a bad as Ms. Buford, meaning that you, too, were involved in starting the union?''

The written policy further provided in paragraph 7, ''This policy and procedure is in addition to action that may be taken when cumulative time lost from work for any reason renders the employee an undependable employee, e.g., lengthy and frequent occurrences which makes the individual a part time employee.'' (G.C. Exh. 3.)

On June 30, 1994, the policy was altered in some respects. To those absences that were not chargeable absences were added paid funeral leave and long-term medical treatment. The 2-month period for earning credit was defined as 40 days. Half-point penalty was changed to allow 6 minutes leeway before the penalty was attached.

Graham testified that it did not ''necessarily mean'' that an employee would be automatically discharged if he viewed 13 points. Respondent witness Donald James Simon, who had been employed by the Respondent since December 1986, described his understanding of the absentee policy:

> [I]t is on a point system. . . . It is after so many points that you get a verbal warning. So many more points, you get a written warning and then after that, you get a day off, and for so many more and so on and so on you get a week off and then after so many other points, you get the most you can get, I suppose, you can be released. . . . this is a no-fault system. [Simon's view of the absentee policy was shared by other employees.]

Warren testified that the seven employees were discharged in July pursuant to the part-time employee provision. She did not so advise the employees, however, that they were discharged for this reason. Warren was asked, ''Now supposing a person is absent and you're thinking about, maybe, firing him. Do you tell him first that he might be fired if he didn't shape up?'' Warren answered, ''Yes.'' Warren was also asked, ''[I]f I've worked there for a month and I'm starting to have a problem, would it be fair to say that I would, probably, get some sort of warning if my attendance starts to—started to slip?'' Warren answered, ''Yes.'' Warren was also asked, ''Under Section 8, what would one have to do in order to be a part-time employee? How many absences would one have to have?'' Warren answered, ''It depends on how the level of service and how chronic they were.'' There is no ''set number'' of absences that is used to determine whether an employee is a part-time employee. Margaret Michael, office manager who instructed new employees, did not explain to employees specifically what part-time employees were.

B. *Discharge of Pamela J. Buford*

Pamela J. Buford worked for the Respondent from November 10, 1993, to July 7, 1994. She worked on the speaker line, the military line, and did cable work. She was hired by Northam and the pay rate was $5.50 an hour. When hired she was handed the Respondent's policy on attendance. In January or February 1994 she phoned Warren. Melton was hooked into the conversation. Buford complained about Northam, no hot water in bathroom, the point system was unfair (Northam would give no ''leeway''), and didn't have the right tools. She asked Warren to come to the plant.

Buford phoned Warren again in about a week. Warren said she was coming ''hopefully soon.'' Warren was at Buchanan.

In that no results even accomplished from Buford's contacts with the Respondent's management, Buford, as above noted, started the union movement. She signed a union card.

After the above-mentioned meeting in which Warren talked about drugs, Warren met individually with Buford. The meeting was in Northam's office. Buford reviewed her complaints.

Shortly after the foregoing interview, Buford's son was scheduled for surgery. She asked for 3 days off. It was denied and Buford took a suspension for 5 days so she could be with her ailing son. She returned to work on July 1, 1994.

Around July 5, 1994, Buford was called into the office. Melton and Warren were present. Buford described the interview:

> Mr. Melton proceeded to say that he didn't know what, to what extent my involvement was in the Union, but that he could assure me that there would—that this would not be a union shop, that the other plants, I believe Buchanan, he said, would be glad to have our work.
>
> He ran the union down. He said that he was on the union at one time, Minnie and himself both and that it didn't do anything for them, basically just badmouthing the union.
>
> Q. Did Ms. Warren say anything?
>
> A. Yes. She did. She looked at me and she said, are you or do you know of anyone else that is involved in the union? And I just looked at Jay Melton and I said, what union?
>
> . . . .
>
> He was very disgusted [sic] at what I said. And he started going over again that this would not be a union shop, that the doors would close first.

Warren testified that she asked Buford if she was aware that ''there's an organizing attempt going on.'' According to Warren, Buford answered, ''I don't know nothing about no union.'' Warren testified that Melton called the meeting with Buford because Buford had missed the two meetings and ''he thought that we should bring her up to date on what went on at those meetings.''

Melton testified that he among other things talked about with Buford was the ''bathroom and tools and stuff'' and about Grasso. He told her that there was an attempt to organize the Union. At the time both Melton and Warren knew that Buford had effected a suspension so that she could be with her ailing son.

On July 7, 1994, Buford was called again into the office where Warren and Grasso were present. Warren read the following letter to her and told her that she was terminated.

ELECTRO-VOICE, INC.

DICIPLINARY ACTION [sic]

EMPLOYEE: Pam Buford CLOCK #: 8175
DATE: July 7, 1994 DEPARTMENT: Cable
NATURE OF OFFENSE: Absenteeism

Based upon the review over the past several weeks Jay, Paul and I have reviewed the entire situation here in Mishawaka.

> This review of the situation included quality, productivity, attendance, and work record. After this review we have decided to take corrective action.
>
> In review of your situation for the length of employment your absenteeism and tardiness is unacceptable. Therefore your employment is being terminated effective immediately.

Orally Buford was told the termination was because of her ''efficiency rate and [her] absenteeism.'' Buford had accumulated 10 points; she had not been cautioned for lack of productivity nor for excess absenteeism nor had she been reprimanded for engineering 5 days off to attend her ailing child.

Grasso testified that when Buford was terminated she was ''irate'' and threatened the Respondent with a lawyer. She was told that she was being discharged ''because of our policy in the Company that it was warranted and we asked her to leave.'' Three times she was asked to leave and then she was escorted out of the plant. Grasso testified that he did not advise Buford that she would be fired after she received the 5-day suspension or the next point.

As noted above the Respondent knew at the time of Buford's discharge that she was a union pusher from Weaver's revelations.

It is significant that Buford was the first employee discharged and Kincses was the second. On the list of employees used by Graham to pick the dischargees Buford and Kincses were noted in handwriting as mother and daughter.

C. *Discharge of Michelle Jo Kincses*

Michelle Jo Kincses was hired May 4, 1994. She worked on ''crossovers, [a part that goes in to speakers] as an assembler.'' Kathy Nash advised her of the attendance policy.

The first union discussions commenced at Kincses' home. Her mother is Buford. Scott Kendall is Kincses' future husband. Buford started the union talk at the plant. Conversations were held in the breakroom and elsewhere. Kincses attended the two union meetings, signed a union card, and served on the union committee.

Kincses met with Warren in the manager's office. Warren asked her if she had any complaints. Kincses said hot water and fans were needed. She also mentioned wages and the point system. Warren said that ''she thought she was going to revise the point system.'' Kincses also said that ''pay should be higher.'' Kincses quoted Warren as saying that ''her opinion of the Union wasn't good. . . . all they did was take her money and . . . it didn't help out like she thought it would.'' ''[S]he asked me if there was a union there, if we had an election, would I vote for it. And I said, yes. And she said, do you think most of the majority would? And I said, yes.''

Kincses' work was never criticized and she was complimented on her work.

A day or two after Melton's group meeting he met with Kincses in the manager's office. Melton said he would be taking Northam's place. He asked Kincses whether she had any complaints or had had problems with Northam. Kincses told Melton that hot water was needed. Kincses said that the positions in the Michigan plant were better ''[c]ause there was a union there and they took care of their people.'' Melton then asked Kincses whether she had signed a ''blue card'' or if anybody else had signed one. He added ''if anybody thinks that they are going to save their job or from the plant closing down, they won't. . . . He said that our work would go there [Austin, Texas]. . . . If a union came in.''

On July 7, 1994, Kincses was called to the office where Warren and Grasso were present. Warren said that ''because of my—how many days I have missed . . . and my poor quality of work, that I was terminated.''

The day Kincses was fired she ''was supposed to work over[time]. . . . 700 crossovers that needed to go out in three days.'' Grasso testified that Kincses cried when she was informed that she was discharged.

At the time Kincses was discharged she had three points. After Kincses was discharged, Warren phoned Kincses and asked her if she wanted to come back to work ''that my position was highly respected.'' Kincses accepted and returned to work on October 22, 1994.

When she returned there was hot water, ''We have shelves. For people that solder, we have those things that suck up smoke and take it over your head'' and more fans. The breakroom had been improved. There are ''new tools.''

On the list of employees reviewed by Graham, above noted, is drawn a line between Kincses and Buford on which is written ''Mother daughter.''

D. *Discharge of Scott Kendall*

Scott Kendall was hired by Northam in February 1994 as a grinder of stadium horns. He worked in the grinding trim room. He received $6.50 an hour. Northam told Kendall ''that 13 points doesn't necessarily mean that you're going to get fired.''

Kendall attended the two union meetings, signed a union card, and served on the union committee.

On one occasion Northam told Kendall that his ''work was good and [he] wasn't in jeopardy of losing [his] job.''

Kendall met individually with Warren (see supra).

On July 7, 1994, Kendall was asked to go to the office. Warren said, ''Looking over my records, being my absenteeism and my quality and rate of work, they was going to terminate me.'' Kendall became angry and ''cussed her out.'' He told them he was fired because of the Union. Kendall had 8-1/2 points.

Simon Jr. testified, ''I think [Kendall] got frustrated and he didn't do as much work as he could have done. He spent a lot of the time in the bathroom . . . he was slow. He wasn't happy at his job.'' According to Simon Jr., he reported the foregoing opinion to Northam and to Grasso after Northam was fired. ''He was a bad worker, probably due to unhappiness.'' Kendall was unhappy because ''the exhaust fans weren't powerful enough to carry out the dust and it was getting all over his skin.'' Although Simon Jr. claimed that he reported Kendall's work habits to Northam, Northam did nothing about it.

In referring to Kendall, Donald James Simon, a Respondent witness, testified, ''I don't think he did a bad job.''

Scott Ressler, a Respondent witness, testified that he saw Kendall go to the bathroom 12 minutes at a time at least 3 or 4 times a day and that Kendall got behind with his work. Ressler reported none of his absenteeism to supervision.

Grasso testified that he never spoke to Kendall about his alleged ''deficiencies.'' Grasso made no recommendation to Graham in regard to Kendall.

E. *Discharge of Sherrie Elaine Mize*

Sherrie Elaine Mize was hired for cleaning cables on May 31, 1994, for $5.75 an hour. She was told that after employees received 13 points they would be fired.

Mize attended the union meeting at Riggio's. Sometime after the union meeting Mize met individually with Warren (see supra).

Mize signed her union card the day before she was discharged. She explained, ''[W]ith them threatening to close the plant down I got scared . . . [s]o I backed off. Well, then, when she [Buford] got back from her suspension, then I went to her and I asked her some questions so I could understand, and then I said I'd go ahead and sign now that I understood, because I wanted to be a part of the union.''

On July 7, 1994, Mize was told to come to the office. Warren ''let [her] know that because of [her] points, [her] efficiencies, and [her] work record, they were firing [her].'' Mize had two points.

At the individual interview with Warren, Mize had told Warren she had received two points for being absent with the flu, one day her car broke down for which she received two points.

According to Mize her work was never criticized.

On October 24, 1994, Mize returned to work. When she returned to work she noticed improvements.

Mize was worried about her efficiencies which she related to Grasso. He said, ''[Y]ou didn't get fired before for your efficiencies and work record. It was because of your points.'' Grasso also commented, ''Well, I think you might have just got caught up in a bad situation.''

F. *The Discharge of Tracy Marie Bentley*

Tracy Marie Bentley commenced work with the Respondent on March 15, 1994, as an assembler. When hired she was told about the 13-point system by Northam.

Bentley attended the union meeting at Ramada Inn and signed a union card. She also met with Warren in the main office. Among other things Warren asked her if she had any problems with management or her supervisor.

On July 7, 1994, Bentley was escorted into the office. Warren said, ''Tracy you have ten and a half points.'' Bentley said, ''No.'' ''[O]kay, Tracy, you have seven and a half points. And this is unacceptable. Therefore, we are terminating you.''

According to Bentley no one had criticized her work.

On October 11, 1994, Bentley was called back to work. Warren told her that they had ''reconsidered [her] termination and wanted to rehire [her].''

Bentley returned to work.

G. *Discharge of Jason Allen Havens*

Jason Allen Havens was employed on May 24, 1994, to work in final finish, sanding, buffing, and repairing parts of speakers. Haven testified that when he was hired he was told you were fired after 13 points; 5 points, oral warning; 7 points, a day off. When discharged he had three points.

Havens first heard of the Union from Buford as he was returning from break. He attended the two union meetings. He signed a union card and became a member of the union committee.

Havens met with Warren at which meeting among other things he asked him if he had any complaints.

Havens was called in the office on July 7, 1994, where Warren and Grasso were. Havens was fired. ''They said it was because of attendance.'' No other reason was given. He told Warren that ''she excused one [absence] and Dennis had excused the other ones, and I assumed that they kept my doctors' excuses.'' Havens asked, ''Well, am I being fired because of the union activity?'' ''[S]he just kind of smirked a little bit.''

Havens had received two points. He denied that he had spent excessive time in the bathroom. He was told that he did a ''good job.''

Grasso testified that he had heard some complaints about Havens spending too much time in the lavatory and that ''[h]is work was below par.'' Warren testified that she became aware of the fact that Havens was standing around, lining up at the timeclock, and going into the bathroom.

Respondent witness Frank Simon Jr. accommodated the Respondent by testifying that Havens ''made anywhere from a half a dozen to a dozen trips to the bathroom a day and no less than ten minutes a trip.'' Simon told Grasso that he ''didn't think he [Havens] was going to work out.''

Simon Jr. testified that he advised Grasso upon Grasso's request that ''Jason doesn't appear like he is interested in working here.'' ''I didn't recommend that he be fired. I recommended that either he would pick up his work pace, be given a certain amount of time or be dismissed, but not fired on the spot.'' Grasso's testimony does not corroborate Simon Jr.'s testimony.

Prior to his discharge Havens had neither been warned nor disciplined concerning his work habits.

Graham was asked why Havens was selected for discharge. He answered, ''Because he was—had only been employed for two months.''

H. *The Discharge of December Ellen Barrows*

December Ellen Barrows was first hired in 1992. In 1993 she quit to go to Missouri. She stayed in Missouri for 2 weeks. When she came back she was asked to return to work, which she did. She worked in assembly.

Barrows described the attendance policy as explained by Northam.

''Thirteen points, discharged.'' Barrows attended two union meetings and signed a union card. She met with Warren (see supra). She also met individually with Melton in Northam's old office. ''He said that he would like to try to get things done for us. If there was anything he could do, he'd like to know. And he just more or less started putting the union down. . . . [T]he union couldn't do anything for us.'' ''[T]hey were working on trying to get [attendance policy] straightened out.'' On July 7, 1994, she went with Grasso in the office. She was told ''that they had been going over the records and they were letting go people with bad attendance and bad work records and I was being let go because of my attendance.'' Barrows had 12 points.

According to Warren when she conducted the individual interview with Barrows the question of points was raised. Barrows said that she had 12 points. Warren did not discuss with Barrows ''what might occur to her if she continued to get more.''

I. *The Discharge of Tracey Jean Dermody*

Tracey Jean Dermody was discharged on July 8, 1994. She had commenced work on December 13, 1993. She was hired by Northam to be an ''assembler, cabler, work the speaker lines and the military lines'' at $5.50 an hour. In regard to absenteeism, Dermody was told ''once you reach 13 points you are discharged'' and that it was a no-fault system and that an employee could be excused for ''death [in] immediate family, jury duty, [and] pre-scheduled surgery.''

At the end of May 1994, Dermody had received a 1-day suspension for being absent. Thereafter she had a reoccurring medical problem of which she informed Kathy Nash and Grasso. The problem started at the end of April. Recently she has had surgery to correct it.

Dermody attended the union meetings, signed a card, and served on the committee. She also had an individual meeting with Warren (see supra).

In the beginning of July Dermody met individually with Melton in the manager's office. According to Dermody, ''He started talking about the union again. Said the same thing about how the union can't protect your job and the union can't get you more money. And if you signed a blue card, you could get it back. They don't tell you that. And he said, they don't tell you you can get it back, but you can.'' Dermody said that she wasn't ''aware of a union card.'' Melton also said, ''We are small and movable.''

Grasso walked over to where Dermody was working and she asked him ''why is everybody so interested in our complaints now? And he goes, 'well, it's not what you think. Minnie was down here before your meeting.' And I go, what meeting. And he said, 'I'm not stupid' and walked away.''

Dermody had been absent because of illness on July 7, 1994. When she arrived at the plant on July 8, 1994, her card was in the rack. Grasso approached her and escorted her to the office. Melton walked in and said, ''[T]hat people who are absent a lot, its hard to get production out.'' Dermody said, ''[Y]ou didn't worry about that last week when you were holding an hour long meeting. And he rolled his eyes at me.'' Grasso said, ''[Y]ou are immediately terminated due to your absenteeism.'' Dermody said, ''Minnie said that people are questioned and things are investigated before somebody is fired.'' Grasso answered, ''Minnie is not hear [sic] to answer that.'' Dermody's production had been satisfactory.

Dermody received a certified letter to come back to work. Because she had been in Texas having surgery, she missed the cutoff date set out in the letter. She talked to Paul who later told her to come to work and bring a medical excuse. She went to work on December 5, 1994. Work conditions had been improved.

J. *Discharge of David E. Shaffer*

David E. Shaffer was hired by Northam on April 11, 1994, to sand down horns (speakers)[18] at $6 an hour. Northam told Shaffer when he was hired that if he received ''12 points, you would be discharged.''

Shaffer heard about the Union from Buford and attended the union meetings of June 17 and 22, 1994, and signed a card.

A month after Shaffer was employed he received a 25-cent-an-hour raise.

Shaffer was discharged on July 5, 1994. When he arrived at work that day his timecard was missing from the rack. Shaffer proceeded to the office where he met Grasso. Grasso told him he was terminated. Shaffer asked, ''Why?'' Grasso replied that Shaffer was grinding the speakers down. Shaffer responded, ''[T]hat's wrong. . . . Why would they have me working there three months grinding them down and I wasn't.'' Grasso then said, ''[Y]ou were in Frank's space [sic].'' Shaffer answered, ''[N]o I wasn't.'' (Shaffer had erroneously accused Frank Simon of stealing speakers.) Grasso said Shaffer was ''getting in Frank's face.''

Shaffer explained the incident to Grasso and asked that Simon be brought in. ''If someone is convicting you of something or—usually, you got the chance to talk to that person.'' Grasso answered, ''[T]his ain't no union shop'' and kind of snickered. Shaffer said, ''[O]h, that's what this is [all] about.'' Shaffer asked to talk to Melton. Grasso replied that if Shaffer did not leave ''he was going to call the law.'' Shaffer persisted and when Melton came Grasso and Shaffer went into his office. Shaffer told Melton the reason he was being fired was wrong. ''If I ground the horns down and that and then turn around and say I am being fired for getting in Frank's face.'' Melton responded, ''[T]hat was [his] problem.''

Shaffer was never warned about faulty work. Shaffer testified he never broke any horns or had been told to keep busy by other employees.

Grasso testified that he had discussed Shaffer's work habits with Melton on July 3 and 5, 1994. Grasso testified that he had passed on to Melton that: ''Frank mentioned it to me that he had broken some horns.'' Grasso also testified he saw Shaffer ''away from his work area.'' Melton was present at the termination.

Grasso testified that Shaffer was discharged because ''[t]here was accumulation of his points, his attitudes towards what I've been telling him not to do [apparently a verbal confirmation[19] with the group leader and talking to other employees] his work habits, and the fact that he was damaging horns.''

According to Grasso, ''I warned him about the confrontation with Frank. I asked him about the horns . . . what was going on with damaging the horns. I asked him to stay in his work area.''

The Respondent in its brief claims that Shaffer dropped at least one horn a day. Shaffer damaged, according to the Respondent's brief, a ''dozen fiberglass horns costing up to $1,100.00.'' If this were true Shaffer would have destroyed horns valued at $13,200. It is preposterous to assert that had Shaffer caused that much damage he would have lasted a week. The Simons, Grasso, and Ressler were not credible witnesses.

[18] The horns were fiberglass. Shaffer hand-sanded them ''down to where the rough stuff is off them.''

[19] Grasso had observed a heated discussion between Simon and Shaffer. He told both employers he did not want it to happen again.

K. *The Alleged Supervisory Status of Kathy Nash*

The General Counsel claims that Kathy Nash was a supervisor within the meaning of the Act.

Buford testified, ''She [Nash] was my main supervisor. She told me what jobs to do, what stations to go to and work.''

Mize testified that Nash was her immediate supervisor. Nash told Mize what to do and Mize went to her for any problems she had.

Barrows corroborated Mize. Barrows testified that Nash evaluated her and signed her evaluations. Nash has a desk. There is paperwork on the desk. Nash also tells employees where they are going to be on the job. Nash ''take[s] the place of somebody if they had to go to the bathroom,'' and she might fill in for an absent employee if she could not find someone to fill the job. Nash did not work on the line on a regular basis. Nash had 12 or 15 employees in the cable department under her charge. Northam was Nash's immediate supervisor. He visited the department occasionally.

Bentley testified that she went to Nash when she wanted time off and the ''bulk'' of her time is ''[s]itting at her desk doing stuff at the computer.''

According to Kincses, Nash told her she was her supervisor. Sometimes Nash would say, ''[C]ome on, let's get to work girls,'' and that sometimes Nash would move employees from one job to another.

Kincses also testified that Nash ''works over the people . . . on the speaker line and cable work, earphones and stuff like that.''

Dermody testified that Nash was her immediate supervisor. She gave out assignments. ''When people would have to use the restroom, she would come take their place or if you got behind, you would call for her or somebody to help you.'' According to Dermody, Nash may have spent 3 hours a day in assembly work.

Nash described herself as a ''group leader, department head'' in the ''back room'' (cable assembly). According to Nash she trains employees, gives them their jobs, brings parts to them, and gets information for them. Whether she does production work depends whether there is absenteeism. ''If there wasn't any, then I just spent my time training and looking over stuff.'' ''I usually go around every morning . . . [to] get them going.'' Between 13 and 14 employees are under Nash as group leader. Nash makes work assignments based on her assessment of the ability of the employees. Weaver testified that she is under Nash. When Nash is out Weaver takes over the whole backroom. On a day-to-day basis she leads the cross-crossovers. Nash takes care of all cable. There are four employees in cross-crossovers. According to Weaver, Nash evaluates her including the employees under her.

Graham testified that Nash signs employee evaluations, Nash has a desk and a computer for tracking various production records, as department head Nash attends meetings with Grasso and Melton, Nash receives more wages than other employees, and Nash places employees in jobs that she thinks they can work best.

Nash may pick employees to work overtime, Nash is responsible for training new employees, and Nash inspects the work in her department to make sure it is performed properly.

A supervisor is defined in Section 2(11) of the Act as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The law on the subject is well summarized by Administrative Law Judge Itkin in the case of *Amperage Electric*, 301 NLRB 5, 13 (1991):

> Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a ''title and theoretical power to perform one or more of the enumerated functions.'' *NLRB v. Southern Bleachery & Print Works, Inc*., 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also ''states the requirement of independence of judgment in the conjunctive with what goes before.'' *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely ''routine,'' ''clerical,'' ''perfunctory'' or ''sporadic'' manner does not elevate a rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146–149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for ''the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act.'' See *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331, 334 (1st Cir. 1948). In short, ''some kinship to management, some empathetic relationship between employer and employee, must exist before the latter becomes a supervisor of the former.'' *NLRB v. Security Guard Service*, supra.

The following factors establish that Nash exercised independent judgment in assigning work and responsibility directing other employees.

Nash possessed authority to assign jobs to employees working under her. Employees viewed her as their supervisor. Employees referred problems to Nash. Nash evaluated employees and signed evaluations. Nash occupies a desk. Nash tells employees where they are going to be on a job. Nash did not work on the line on a regular basis. Nash had 12 to 15 employees under her charge. Employees requested time off from Nash. The bulk of Nash's time is spent ''[s]itting at her desk doing stuff at the computer.'' Nash moved employees from job to job. Nash trained employees. Work assignments were made on the basis of an employee's

ability. As department head, Nash attended meetings with Melton and Grasso. Nash received more wages than other employees. Nash may choose employees to work overtime. Nash inspects employees' work.

I find Nash is a supervisor within the meaning of the Act. See *Clark & Wilson Industries*, 290 NLRB 106 (1988); *McDonald Mitler Co*., 277 NLRB 701, 703 (1985); and *Amperage Electric*, supra.

IV. VIOLATION OF SECTION 8(a)(1) OF THE ACT

First: Warren's solicitation of employees' complaints and grievances on June 23, 24, 25, and July 5, 1994, were in violation of Section 8(a)(1) of the Act. Melton's solicitation of employees' complaints and grievances in individual interviews with employees and his solicitation of complaints in his addresses to employees were in violation of Section 8(a)(1) of the Act.

It was clear from the representation of Warren and Melton that employees' complaints and grievances would be favorably considered. In fact the complaints and grievances were favorably treated. Melton was asked, ''Was their any particular issue or problem or concern that was raised that you promised right on the spot to take care of?'' Melton answered, ''Fans in particular.''

In the case of *Merle Lindsey Chevrolet*, 231 NLRB 478 fn. 2 (1977), the Board stated:

> We agree with the Administrative Law Judge that by telling employees he wanted to ascertain and talk about their problems Respondent's president, Merle Lindsey, violated Sec. 8(a)(1) of the Act. *Uarca Incorporated*, 216 NLRB 1 (1974). In that case, the Board stated:
>
> > [T]he solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. . . . However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.
>
> In the instant case, there is no evidence that Respondent made any statement or took any action to establish that it was not promising to remedy grievances and we therefore find that Respondent did not meet its burden of rebutting the inference.

As in the *Merle Lindsey Chevrolet* case, the respondent made no statement or took no action to establish that it was not promising to remedy the problems and thus did not rebut the inference. See also *Gull, Inc*., 279 NLRB 931 fn. 1 (1986).

The following statements and remarks were in violation of Section 8(a)(1). Warren's statement to Barrows ''[t]hat she had been in the union; the union could not do anything for us.'' Warren's statement to Kendall that ''she didn't believe that there was enough people to support [the] union.'' Melton's statement ''this will not be a union shop.'' Melton's statement that Mishawaka work would go to a plant in Austin, Texas, which had a fiberglass shop, if ''a union came in.'' Melton's statement ''there would not be a union or the plant would shut down.'' Melton's statement that ''there would be no union in that shop. . . . the plant would close down first.''

Melton's statement: ''[T]here will be no union here in the shop. . . . he was part of the union at one time and the union didn't do anything for him. . . . the union can't give us more money.''

Melton's statement ''there will not be a union. . . . if the Union [comes] in the plant, or words to this effect, that the plant [will] be closed'' (Vore's testimony).

Melton's admitted statement ''there is no need for a union in Mishawaka. . . . my experience in a union, they can't do anything for you, that only the company can give you things,'' said in conjunction with the Respondent's promise of improvements.

Melton's admitted statement that ''there was no need for a union because of the problems we had in the plant.''

Melton's statement ''problems that were existing here at Mishawaka could be resolved without any union.'' (Grasso's testimony.)

Melton's statement that ''he had heard rumors that some of us had, uh, thought about getting together for a union meeting and, uh, he just let us know that we shouldn't have to do that. . . . he had been in the union before and, uh, he had seen both sides and he said in our situation he really didn't see any reason for us to go in that direction and he wished that we didn't.'' (Testimony of Respondent witness Donald Simon.)

Melton's remark to Buford while he and Warren were interviewing her that ''he didn't know what, to what extent my involvement was in the Union, but he could assure me that there would—that this would not be a union shop, that the other plants . . . would be glad to have our work. . . . that this would not be a union shop, that the doors would close first.''

Melton's remark to Kincses in a private interview, ''[I]f anybody thinks that they are going to save their job or from the plant closing down they won't. . . . He said our work would go there [Austin, Texas]. . . . if [the] union came in.''

The foregoing statements in derogation of employees' Section 7 rights (threats of plant closing, promises of benefits, there will never be a union in the shop, removal of work if the Union came in, there is no need for a union, that the Union can do nothing for the employees, and the problems could be resolved without a union), in the context used, were in violation of Section 8(a)(1) of the Act.

''It is the . . . tendency of employer statements, not their actual effect, that constitutes a violation of the Act.'' *NLRB v. Marine Optical, Inc*., 671 F.2d 11, 18 (1st Cir. 1982). Additionally, an attempt to denigrate the union violates Section 8(a)(1) because it conveys the position that it is futile to support or remain a member of the union. *Albert Einstein Medical Center*, 316 NLRB 1040 (1995).

A. *Impressions of Surveillance*

I do not find as claimed by the General Counsel that Grasso's reply to Dermody when she asked why everybody now suddenly was interested in employees' problems, i.e. ''will [sic] it's not what you think. Minnie was down before

our meeting'' (Dermody asked what meeting and Grasso answered, ''I'm not stupid''), created an impression of surveillance.

B. *Interrogations*

I find that the following interrogations in the context used violate Section 8(a)(1) of the Act. See *Rossmore House*, 269 NLRB 1176 (1984).

Warren's question to Buford while being interviewed by Melton and Warren, ''[A]re you or do you know of anyone else that is involved in the union?''

Warren's admitted interrogation of Buford as to whether she was aware that ''there's an organizing attempt going on.''

Warren's question to Kincses, ''[I]f there was a union there, if we had an election, would I vote for it. . . . do you think the majority would?''

Melton's question of Kincses in the private interview about whether she had signed a ''blue card . . . or if anybody else had signed one.''

C. *The Discharges*

In *Wright Line*, 251 NLRB 1083 (1980), the Board established the rule that when the General Counsel makes a prima facie case showing sufficient evidence to support the inference that protected conduct was the ''motivating factor'' in the employer's decision to discharge, the burden shifts to the employer to demonstrate that the discharge would have taken place even in the absence of the protected conduct.

''The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus.'' *Best Plumbing Supply*, 310 NLRB 143 (1993). The General Counsel has met this test.

The General Counsel's prima facie case showing discriminatory motivation is supported by the following credible evidence.[20]

1. The Respondent's antiunion animus was of such an adamant nature that the Respondent committed unfair labor practices as a means of dissuading its employees from union affection.

2. Although the Respondent dealt without serious labor difficulties with the union in its other plants, it was motivated by certain alleged economic and/or financial restraints to keep the Union out of the Mishawaka plant.

Graham testified that Mishawaka's fiberglass and horn operations were ''absolutely critical'' to the Company's operation because there are not dependable suppliers and they are unique to the Company. Initially in order to recapture this business the Company needed a lower labor cost. The work was placed in Mishawaka's nonunion shop because of lower labor rates. According to Graham ''there was just no way we could do it with the labor—the labor structure'' in Buchanan or Newport.

Melton testified that competition can be effected by a labor union. ''I've seen it happen in plants where you can drive work out because of the raise in prices and Mishawaka has *a very fine line in competitive products* back there and my concern was anything that might impact it would—would be an issue.'' (Emphasis added.) According to Melton, Mishawaka is the most competitive plant. Graham apparently expressed the Respondent's apprehension of the advent of the Union in these words: ''[T]here is way too much invested there to—to, uh . . . to let the plant go at the—the kind of risk that we thought it was.''

3. On learning of union activity the Respondent immediately embarked on a counteroffensive sending Warren to Mishawaka to interview individual employees and represent to them that their complaints would be addressed.

(Graham learned of the union movement from Ressler; Warren's interviews with employees indicated that she knew of union activity; Melton in his addresses to the employees revealed that he knew about union activity. Through Weaver Grasso learned of Buford's role in the union organization and that Weaver had signed a union card and attended a union meeting. Warren's and Melton's remarks to and interrogation of Buford and their singling her out for a dual interview indicated that they were aware of her union affection and that there was union organizing going on in the plant. Nash knew of the union activities.)

The ''small plant doctrine'' line of cases is also applicable here (*Wiese Plow Welding Co.*, 123 NLRB 616 (1959)). Such doctrine is not needed, however, to support a finding of knowledge because there is no doubt the Respondent knew of the discriminatees' union activities at the time of the discharges.

Persons unionwise (former union representative) and plantwise in their personal interviews with the employees would no doubt have been able to detect union affection.

4. The attendance policy which was used as a basis for the dischargees was modified arbitrarily on July 7, 1994, to accommodate the discharge of the discriminatees.

(Graham was asked what was so magical about the number seven. He replied, ''Seven seemed to me, to be an exorbitant number.'' ''Q. All right. Well, why not six? A. Seven occurred to me.'')

5. Four employees were returned to work to limit the Respondent's liability.

6. None of the discriminatees had ever been warned that they would be discharged for the offenses for which they were discharged.

7. None of the discriminatees had been recommended for discharge by any of their supervisors. (The discharges were solely Graham's affair.)

8. Graham, who solely caused the discharges, had little or no information about the employees' attendance records or job performance.

9. All the discharged employees were union partisans.

10. The discharges of the employees were precipitous occurring immediately after Graham learned of the union letter requesting representation. None had been told they were subjects of discharge or warned of that eventuality.

(Warren indicated that employees were generally warned if they had attendance problems. Mitigating circumstances were also considered.)

By reason of the General Counsel's prima facie case, the burden is with the Respondent to prove that the discharges

[20] ''Under Board precedent, a prima facie case may be established by the record as a whole and is not limited to evidence presented by the General Counsel. . . . The Board's precedent allows the judge to analyze the prima facie case based on all record evidence.'' *Greco & Haines, Inc.*, 306 NLRB 634 (1992).

would have taken place even in the absence of the protected conduct.[21] The Respondent has not met this burden.

Graham testified why the employees were chosen for discharge. ''The one thing that we said that we wanted to accomplish, is that we wanted to get people serious about our attendance policy, serious about our attendance policy, serious about coming to work every day, and being there when they were supposed to be.'' Graham further testified that the discharges were based ''solely on their excessive and chronic absences. . . . with some additional information coming to play with performance on at least three individuals.'' Graham deposed, ''I told Minnie to be sure to tell the employees— . . . that they were being discharged for excessive or chronic absenteeism and tardiness.'' Graham testified that he made up his mind to discharge the employees when he looked at the ''summary of the absentee problem'' and was also moved because ''our absentee problem was being viewed as a joke.''[22]

The Respondent has not established by credible evidence that the attendance policy had ever been used to discharge employees before to bolster attendance of employees or that Graham was administering the policy as it had been administered in the past.

In attempting to bolster Graham's arbitrary action the Respondent failed to consider that the alleged drop in productivity may have been due to the admitted ill treatment of the employees and that the increase in productivity was due to the rectification of employee complaints. Moreover, Graham testified, ''We didn't need as many people as we were letting go. We could do it with less people.'' Additionally Nash was present without a work assignment available to fill in for an absent employee. Thus absenteeism apparently was not as big a problem as it was blown up to be. Indeed, Graham testified that he ''didn't look at anything'' prior to the meeting to lead him to believe there was an absentee problem. In fact, the credible evidence indicates that Graham looked at nothing except a list of employees above noted. His action was wholly arbitrary for the purpose of lopping off employees with union affection. Graham made no credible investigation of any employee's conduct nor confronted any employee with any alleged improprieties which apparently had been the custom.[23] The credible evidence establishes that Graham was the sole mover in the discharges and that his action in this regard occurred immediately after he had received the Union's recognition request letter.

All employees discharged were a part of the Respondent's scheme to thwart the employees' organizational aspirations and were victims of the Respondent's thrust to kill union affection and support in the Mishawaka plant. In this respect the Respondent was successful.

Because of the foregoing, I conclude that the reasons advanced by the Respondent for the discharges of its employees were pretextuous,[24] and the real motive for discharging[25] the Respondent's employees was discriminatory. The credible evidence in this case sustains the General Counsel's complaint regarding the 8(a)(3) discharges by a preponderance of the credible evidence. I am convinced that the discriminatees would not have been discharged if they had not engaged in protected union activities. *Wright Line*, supra. The Respondent offered an implausible and false explanation for the discharges.

I find that the Respondent's discharging of its Mishawaka employees, as detailed, violated Section 8(a)(3) and (1) of the Act.

Although the credited evidence indicates that the Respondent knew Buford was a union partisan, it is immaterial whether specificity as to each dischargee's union affection must be proved as the General Counsel has shown that the ''Respondent's conduct was discriminatorily motivated against all its employees.'' *Treanor Moving & Storage Co*., 311 NLRB 371 (1993). See also *Davis Supermarkets*, 306 NLRB 426 (1992).

V. ALLEGED VIOLATIONS OF SECTION 8(a)(5) OF THE ACT

''In determining whether a bargaining order is appropriate, in addition to examining the severity of the violations committed, the Board also examines the present effects of the coercive unfair labor practices which would prevent the holding of a fair election.'' *Bridgeway Oldsmobile*, 281 NLRB 1246 (1986). In weighing a violation's pervasiveness, relevant considerations include ''the number of employees directly effected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice.'' *Michigan Expediting Service*, 282 NLRB 210, 211 (1986). See also *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

Here the unit was a small unit of less than 30 employees; all were effected; a high official of the ''umbrella'' company deliberately, personally, and unlawfully discharged nearly one third of the labor force to discourage employees' union

[21] As stated on *W. F. Bolin Co*., 311 NLRB 1118, 1119 (1993): Discriminatory motivation may reasonably be inferred from various factors, including an employer's expressed hostility toward protected activity together with its knowledge of the employee's protected activity. . . . An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected activity.

[22] Graham supposedly received this ''joke'' version on which he apparently heavily relied from his golf partner Ressler. How employees or Graham could have believed that the harsh administration of the attendance policy that they were protesting and that had been so unrelentlessly enforced, to a point when for several seconds' tardiness an employee received a point, was a joke is highly improbable.

[23] It was stated in *United States Rubber Co. v. NLRB*, 384 F.2d 660, 662–663 (5th Cir. 1967). ''Perhaps most damning is the fact both [employees] were summarily discharged after reports of their misconduct . . . without being given any opportunity to explain or give their versions.''

[24] See *Limestone Apparel Corp*., 255 NLRB 722 (1981). ''[A] finding of pretext necessarily means that the reasons advanced by the [Respondent] either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.''

[25] ''[T]he 'real motive' of the employer in an alleged Section 8(a)(3) violation is decisive.'' *NLRB v. Brown Food Store*, 380 U.S. 278, 287 (1965). ''It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test.'' *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961). ''Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. . . . It has long been established that a finding of violation under this section will normally turn on the employer's motivation.'' *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965).

activities and affection. Such action could not avoid having a lasting adverse impact on unit employees' memories.

The atmosphere for a free and fair election was destroyed. Here is little chance of a free choice of representatives without a *Gissel*-type bargaining order. The Respondent's grave acts of misconduct struck at the core of the Union's organizational effort and destroyed any chance of union representation within the foreseeable future without a bargaining order. Accordingly, a *Gissel*-type bargaining order is the only appropriate remedy. It was the purpose of *Gissel* to correct this kind of situation.

Because I find that the Union as of July 7, 1994, represented a majority of the Respondent's employees in an appropriate unit, I find that the Respondent, by refusing to recognize and bargain with the Union in the appropriate unit, violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised.

2. The Union is a labor organization with the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging David E. Shaffer on July 5, 1994; Pamela J. Buford, Sherrie Elaine Mize, Jason Allen Havens, Scott Kendall, Tracy Marie Bentley, Michelle Jo Kincses on July 7, 1994; and Tracy Jean Dermody and December Ellen Barrows on July 8, 1994, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The Union represented an uncoerced majority of the Respondent's employees on July 7, 1994, is an appropriate unit at the time the Union made a demand for collective-bargaining representative.

The appropriate unit is all production and maintenance workers, including maintenance and lead persons at the Employer's facility in Mishawaka, Indiana; BUT EXCLUDING office clerical employees, professional employees, guards, and supervisors as defined in the Act.

6. By refusing to recognize and bargain with the Union on and after July 7, 1994, the Respondent violated Section 8(a)(5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent unlawfully discharged Pamela J. Buford, David E. Shaffer, Sherrie Elaine Mize, Jason Allen Havens, December Ellen Barrows, Scott Kendall, Tracy Marie Bentley, Michelle Jo Kincses, and Tracy Jean Dermody, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that the Respondent offer the above-named persons immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of their discharges to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's acts here detailed, by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful discharges to the date of valid offers of reinstatement, less their net interim earnings during such periods, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

IT IS FURTHER RECOMMENDED that the Respondent recognize and bargain with the Union as its employees' collective-bargaining representative in the unit found appropriate.

[Recommended Order omitted from publication.]